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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 8, Original.

EX PARTE: IN THE MATTER OF GEORGE MORAN, PETITIONER.

BRIEF FOR THE PETITIONER.

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PETITION FOR WRIT OF HABEAS CORPUS AND CERTIORARI.

BRIEF IN BEHALF OF PETITIONER.

On the 16th day of April, A. D. 1906, leave was granted to the petitioner, George Moran, by this honorable court to file his petition as an original proceeding for writ of *habeas corpus* and writ of certiorari to the United States circuit court of appeals for the eighth circuit, and a rule was issued thereon by this court to the warden of the Kansas State penitentiary at Lansing, Kansas, directing him to show cause within thirty days before this court why the prayer of the petitioner should not be granted.

W. H. Haskell, warden of the penitentiary, made his return to the rule and the petition on the 15th day of May, A. D. 1906, setting up therein cause for the detention of the petitioner a certified copy of the indictment and the judgment of the district court within and for Comanche county thereon, as shown by the exhibit to the petition, and also a certified copy

of the contract entered into between the Oklahoma authorities and the warden of the penitentiary.

To this return the petitioner filed his demurrer on the 19th day of May, A. D. 1906, and the matter is now before the court for final hearing upon the petition, the return thereto and the demurrer to said return.

STATEMENT OF FACTS.

The petitioner alleges in substance as grounds for release and why the judgment of the court is void and his imprisonment illegal:

First. That at the time the pretended indictment was returned by the grand jury the court was not organized as required by the act of Congress creating it, as set out specifically in the petition, and therefore it had no authority to organize the grand jury or to try said petitioner.

Second. That the pretended court failed to acquire any jurisdiction over said petitioner for want of a valid indictment, and that the paper returned as an indictment was absolutely void; and the reasons alleged for the invalidity of said indictment in substance are: that the court wholly and purposely disregarded the laws of the Territory of Oklahoma relative to the drawing, selection, and organizing of a grand jury, and that the common law and the laws of the United States were likewise non-observed, in this: that the court issued an open venire, and the names were not drawn as required by law, etc.; that none of said persons composing said pretended grand jury *were qualified electors* under the law of the Territory, and none of them were qualified grand jurors under the law, and many of them were *non-residents* of the county and Territory, and one of said persons composing said grand jury was bodily and mentally disqualified by reason of being addicted to opiates; that the officer directed to sum-

mon said persons composing said pretended grand jury was prejudiced against the petitioner and purposely selected the persons composing said pretended grand jury within and about the city of Lawton among and out of transient persons about thirty-five miles from where said alleged crime was committed. He alleges that he was not present and had no opportunity to object to the procedure in the selection, empaneling, and organizing of said pretended grand jury, but at the first opportunity he filed his motion in accordance with the statutes of Oklahoma, praying that the court quash and set aside said indictment, as shown by the copy of said motion attached to the petition, and alleges that the facts in said motion were at said time and are now true. He further alleges that the court, without any discretion and in contravention of a plain statute, arbitrarily overruled said motion and thereby exceeded its jurisdiction, and, for the reasons alleged, the judgment is void. He further alleges that he has exhausted all remedies open to him in the ordinary modes without avail, and that he comes to this court in this proceeding as his only remedy for relief.

Third. He challenges the judgment of the court on another ground and alleges the court was without jurisdiction for the reason the particular portion of the country where said alleged crime was committed was not embraced in any organized county at the date of the commission of said crime, and that said unorganized portion of said Territory was under the jurisdiction of Canadian county for judicial purposes by virtue of an order of the Supreme Court attaching said country to Canadian county for judicial purposes under the act known as "The Organic Act of Oklahoma," and therefore the venue of said alleged crime was in Canadian county and not in Comanche county. A copy of the order of the Supreme Court, as aforesaid, is attached to the petition as Exhibit "F."

Fourth. He alleges as another reason for the invalidity of said judgment under which he is imprisoned that that por-

tion of the Territory wherein said alleged crime was committed and on the date of the alleged commission thereof was under the exclusive jurisdiction of the United States, and for that reason the district court sitting as a territorial court had no jurisdiction over said crime or over said petitioner.

Fifth. The last ground upon which the petitioner relies is that the court was deprived of any jurisdiction over him or over said alleged crime for the reason it invaded the petitioner's constitutional rights during the progress of said trial by compelling him to be a witness against himself, over his objections, and by misconduct of the officer in charge of the jury in permitting the jury to receive evidence outside of the court-room and in the absence of the court, and in that manner compelling said petitioner to be a witness against himself, and thereby the court lost jurisdiction over said petitioner by reason of invading his constitutional rights.

These facts, as more fully and specifically set out in the petition, are in no way denied or otherwise controlled by the record or other evidence, and stand as admitted.

The question now arises upon the admitted facts whether or not the trial court ever rightfully acquired jurisdiction over the petitioner and the alleged crime by reason of the facts alleged in the petition, or if jurisdiction was rightfully acquired whether or not the court lost its jurisdiction by reason of invading and denying the petitioner his constitutional rights and transcending a plain statute, which he contends had the effect of rendering the proceedings void.

In the outset the petitioner desires to set out a few propositions of law upon which he relies in this case.

PROPOSITIONS OF LAW RELIED UPON BY PETITIONER.

First. That the facts alleged in the petition herein, properly verified and not having been denied under oath, and which are not otherwise controlled or contradicted by the record or any evidence may be taken as true as fully as though they had been duly proven before the court.

Second. A court created by an act of the legislature only has such power and authority as given it by the act creating same, and if not organized, as prescribed by the statute, it has no power or authority to act, and its proceedings are coram non judice and void.

Third. In a habeas corpus proceeding the court to ascertain whether the trial court has exceeded or acted beyond its jurisdiction may look to the whole record, and where the record is silent as to any other facts tending to show want of jurisdiction in the court to render the particular judgment complained of, evidence aliunde may be received; and under the laws and Constitution of the United States in cases affecting life and liberty the court may, under certain circumstances in habeas corpus proceedings, permit the record to be contradicted in order to show a want of jurisdiction in the trial court to render the particular judgment complained of.

Fourth. In a proceeding in a Federal court, or territorial court organized under the Federal Government, against a party charged with a capital or otherwise infamous crime a valid and legal indictment, presented by a grand jury, is a prerequisite to give the court jurisdiction over the person of the defendant.

FIFTH. THE COURTS IN THE TERRITORY OF OKLAHOMA CAN NO MORE DISREGARD THE PLAIN PROVISIONS OF THE STATUTE IN THE SELECTION AND EMPANELING OF A GRAND JURY IN A CAPITAL CASE, MADE FOR THE PROTECTION OF A DEFENDANT, AND BY THAT MEANS DEPRIVE HIM OF HIS FUNDAMENTAL AND CONSTITUTIONAL RIGHTS, THAN CAN THE LEGISLATURE OF SAID TERRITORY DEPRIVE HIM OF SUCH RIGHTS BY ENACTING A LAW WHICH IS IN CONFLICT WITH ANY PROVISION OF THE CONSTITUTION.

SIXTH. THE CIRCUIT COURT OF APPEALS ERRED WHEREIN IT HELD, IN EFFECT, IN THIS CASE, THAT THE TERRITORIAL GOVERNMENT AND THE TERRITORIAL COURTS OF THE TERRITORY OF OKLAHOMA STAND IN THE SAME RELATION TO THE FEDERAL GOVERNMENT AS STATE GOVERNMENTS AND STATE COURTS, AND IN HOLDING THAT THE FEDERAL COURT HAS NO AUTHORITY OR POWER TO RELEASE THE PETITIONER BY WRIT OF HABEAS CORPUS, ALTHOUGH THE FACTS SHOW THE TERRITORIAL TRIAL COURT EXCEEDED ITS JURISDICTION.

SEVENTH. WHERE THE LOCAL LEGISLATURE HAS ENACTED A LAW GOVERNING THE COURTS IN THE SELECTION, SUMMONING, EMPANELING, AND ORGANIZING OF A GRAND JURY, WHICH LAW IS INCONSISTENT WITH THE COMMON LAW, SUCH MODE IS EXCLUSIVE AND MUST BE FOLLOWED. IT IS ONLY WHEN THE LOCAL STATUTE HAS MADE NO PROVISION IN SUCH CASES OR THE STATUTE HAS FIRST BEEN EXHAUSTED THAT THE COURT CAN RESORT TO THE COMMON-LAW METHOD OF SECURING A GRAND JURY, AND THEN THE JURORS MUST BE QUALIFIED UNDER THE STATUTE.

EIGHTH. IN ORDER TO CONSTITUTE A LEGAL AND VALID INDICTMENT THE PLAIN PROVISIONS OF THE STATUTE RELATIVE TO THE SELECTION, SUMMONING, AND EMPANELING OF A GRAND JURY MUST BE SUBSTANTIALLY COMPLIED WITH, AND IF THE COURT WHOLLY DISREGARDS THE STATUTE IN ANY MA-

TERIAL MATTER THE BODY CALLED A GRAND JURY IS NOT A LEGAL GRAND JURY, AND PRETENDED INDICTMENT FOUND AND RETURNED BY IT IS ABSOLUTELY VOID.

NINTH. THE LAW IN THE TERRITORY OF OKLAHOMA RELATIVE TO THE SELECTION, SUMMONING, AND ORGANIZING OF A GRAND JURY IS A COMPLETE SYSTEM AND APPLIES TO THE WHOLE TERRITORY, AND IT IS SPECIFIC AND MANDATORY.

TENTH. WHERE THE TRIAL COURT HAS WHOLLY DISREGARDED THE LAW RELATIVE TO THE SUMMONING, EMPANELING, AND ORGANIZING OF A GRAND JURY, AS SHOWN BY THE RECORD IN THE CASE AT BAR, AND THE PETITIONER HAS SEASONABLY PRESENTED HIS OBJECTIONS AND HAS SOUGHT RELIEF BY THE ORDINARY MODES OPEN TO HIM UNDER THE STATUTE, WITHOUT AVAIL, THIS COURT WILL TAKE JURISDICTION AND WILL RELIEVE HIM FROM ILLEGAL IMPRISONMENT IF IN THE TRIAL RESULTING IN HIS CONVICTION AND IMPRISONMENT HE HAS BEEN DENIED FUNDAMENTAL RIGHTS GUARANTEED HIM UNDER THE CONSTITUTION.

ELEVENTH. UNDER THE ACT OF CONGRESS KNOWN AS THE ORGANIC ACT OF THE TERRITORY OF OKLAHOMA THE CONDITION OF THAT PORTION OF THE TERRITORY WHEREIN SAID ALLEGED CRIME WAS COMMITTED AT THE DATE OF THE COMMISSION THEREOF FIXED THE VENUE AND PLACE OF TRIAL, INSTEAD OF THE CONDITION OF THAT PORTION OF SAID TERRITORY AT THE DATE OF FINAL TRIAL.

TWELFTH. ANY CRIME COMMITTED ON ANY INDIAN RESERVATION, OR IN ANY COUNTRY OR ON ANY LANDS UNDER THE EXCLUSIVE JURISDICTION OF THE UNITED STATES, IS A CRIME AGAINST THE FEDERAL GOVERNMENT AND IT HAS EXCLUSIVE AND ONLY JURISDICTION TO PROSECUTE AND PUNISH THE OFFENDER FOR THE COMMISSION THEREOF.

THIRTEENTH. THE PETITIONER HAVING BEEN COMPELLED, OVER HIS OBJECTION, TO EXHIBIT HIMSELF BEFORE THE JURY AND WALK IN THE PRESENCE OF THE JURY WHILE STATIONED OUTSIDE OF THE COURT-ROOM AND OUT OF THE PRESENCE OF THE COURT, FOR THE PURPOSE OF THE JURY OBSERVING HIS PECULIAR WALK, SIZE, AND GENERAL APPEARANCE, WAS THEREBY FORCED AND COMPELLED TO BE A WITNESS AGAINST HIMSELF WITHIN THE PURVIEW OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

FOURTEENTH. THE FEDERAL COURT WILL INTERFERE IN THE ADMINISTRATION OF A TERRITORIAL COURT, AND EVEN A STATE COURT, IN HABEAS CORPUS PROCEEDINGS WHEN SAID COURT, IN THE ADMINISTRATION OF THE LAW OF SAID TERRITORY OR STATE, DISREGARDS AND DENIES A CITIZEN HIS FUNDAMENTAL AND CONSTITUTIONAL RIGHTS, ESPECIALLY IF SAID CITIZEN HAS EXHAUSTED THE ORDINARY MODES OF REVIEW BY APPEAL OR WRIT OF ERROR.

We desire first to briefly call the attention of the court to the propositions asserted herein and to the power of the court in *habeas corpus* proceedings from a negative standpoint, as we understand the law.

We appreciate the well-settled doctrine as laid down by this court that the writ of *habeas corpus* will not be used and made to serve the purpose of an appeal or writ of error; but, with a few exceptional and urgent cases, will only be issued when the judgment under which the petitioner is detained is absolutely void; however, it has been held in a few exceptional cases where the error is apparent that it will be issued to save the expense and delay by the ordinary modes of procedure.

See *In re* Chapman, 156 U. S., 218; Storti *vs.* Massachusetts, 193 U. S., 142.

We further appreciate the fact that this court will not ordinarily interfere with the proceedings of the State courts in

the application, construction, and administration of the State laws by writ of *habeas corpus,* except in cases where it is plainly shown that the State courts have denied a citizen those fundamental rights guaranteed under the Constitution, and that in the excepted cases this court will not grant the writ of *habeas corpus* until the party has exhausted his remedies in the ordinary modes provided by the State law for appeal or writ of error, and as provided by the act of Congress for an appeal or writ of error to this court.

We are also aware that the fifth and sixth amendments to the Constitution do not apply and are no inhibition upon the States and State courts, but we insist they do apply to the Territories.

We, too, realize the fact that the court will not ordinarily after conviction issue the writ of *habeas corpus* for mere irregularities or errors committed by the court in empaneling the grand jury which found the indictment, but in cases where the court has disregarded the whole law in the selection and empaneling of the grand jury and permits persons wholly incompetent and disqualified under the law to become members of that body, then in such cases the whole proceedings are void and their finding and presentment is insufficient to give the court jurisdiction, and the writ will issue.

While we are fairly familiar with these different rules, as laid down by this court, yet we do contend that, in cases where the court overrides a plain statute and invades the petitioner's constitutional rights and commits such error as renders the judgment void, this court will not refuse to take jurisdiction and issue the writ of *habeas corpus* and release the prisoner merely for the reason the trial court committed an error. Every void judgment is an erroneous judgment by reason of errors committed by the trial court, while every erroneous judgment or every error committed by the trial court does not make or constitute a judgment void, and we contend in the present case that for the several grounds set out in the petition and admitted to be true the court failed to acquire

jurisdiction over the person of the petitioner, and if it ever rightfully had jurisdiction over him it lost such jurisdiction by overriding and disregarding the plain provision of the statute and in invading his constitutional rights.

ARGUMENT AND AUTHORITIES IN SUPPORT OF FIRST PROPOSITION.

These facts, having been alleged in detail in the petition and not in any way denied or contradicted by the return of the warden and not otherwise controlled by the record or evidence, we take it, will be taken as though duly proven. It was so held in the case of Kohl *vs.* Lehlback, reported in 160 U. S., p. 291, opinion rendered by Chief Justice Fuller, and also in the case of Whitten *vs.* Tomlison, 160 U. S., p. 231. This court in these cases used the following language:

"On a petition for writ of *habeas corpus,* verified by the oath of the petitioner, as required by the U. S. Revised Statutes, section 754, facts duly alleged may be taken to be true unless denied by the return or controlled by other evidence."

ARGUMENT AND AUTHORITIES CITED UNDER SECOND PROPOSITION.

WAS THE DISTRICT COURT THAT CAUSED THE INDICTMENT AND TRIAL OF THE PETITIONER ORGANIZED AS REQUIRED BY THE ACT OF CONGRESS CREATING IT?

Referring to section 9 of the act of Congress, section 69, page 75, of Wilson's Annotated Statutes of Oklahoma, it is provided:

"The Supreme Court shall define said judicial districts and shall fix the times *and places* at each county seat in each district where the district court shall be held, and designate the judge who shall preside therein."

And again under a later act of Congress providing for the appointment of additional judges for the Territory of Oklahoma, approved August 8, 1894, it is provided:

"The said Territory shall be divided into five judicial districts and a district court shall be held in each county, as now provided by law. The Supreme Court of said Territory shall define said judicial districts and shall fix the times *and places* at each county seat in each district where the district court shall be held, and designate the judge who shall preside therein."

It will be seen by these provisions that in order for a district court to be properly organized, with power to try cases as a court, there were four things to be done by the Supreme Court. The first was to define the judicial district; second, to designate the time when the court should be held; third, to fix the *place* at the county seat where the court should be held; and, fourth, to designate the judge who should preside therein. One seems to be just as obligatory and as specific and necessary as the other. If the Supreme Court could disregard one provision, why *could it not another* and fail to fix any time, but let the trial judge hold court at his pleasure? Also it might as well fail to designate the judge to preside in each district and let each judge go where he pleased to hold court. The law provided that a court should be held in each county; the law provided that a court should be held at each county seat. There being no county buildings or courthouses at the time, it was necessary that some *place* be designated at the county seat for the court to be held. This the law said should be *fixed by the Supreme Court.*

The Congress of the United States, in order that there might be some uniformity and some definite and permanent place of holding court, saw proper to place the duty of fixing the *places* at the county seat of holding court upon the Supreme Court of the Territory. That being true, can said court, by failing and refusing to fix the place, leave it for the

district judge, and in that manner organize a court with authority to transact the business of a court?

We think it unnecessary to cite but little authority on the proposition that a court created by the legislature can only be organized in the manner and as provided by the law creating it, and if it is not organized as provided by the law creating it, then it has no power or authority to try cases and to render a valid judgment.

Quoting from second edition, 8th Enc. Law, page 284:

"Both *time* and *place* are essential constituents of the organization of a court."

Hobart *vs.* Hobart, 45 Ia., 503; Columbus *vs.* Woolen Mills Co., 30 Ind., 436; Greenwood *vs.* Bradford, 128 Mass., 296; King *vs.* King, 1 P. M. W., 19.

"The *place* is an important element of the court."

In re Allison, 13 Colo., 535; American St. Rep., 224.

In 21st vol., Enc. Pleading and Practice, page 608, the rule is laid down as follows:

"Where the power is delegated to the *Supreme Court* to fix the time and *place* of holding court such power cannot be exercised by a *single district judge* in his district."

Northrup *vs.* People, 37 N. Y., 203.

"Accordingly, when it is attempted to hold a term or session at a time and place different from those prescribed all acts done thereat, other than those properly done in vacation, are as a general rule absolutely void."

Ex parte Cranch, 63 Ala., 283; Boynton *vs.* Wilson, 46 Ala., 510; Garland *vs.* Dunn, 63 Ala., 404; Wrightnor *vs.* Carsner, 20 Ala., 446; Napper *vs.* Nolan, 9 Port (Ala.), 218; Nabor *vs.* State, 6 Ala., 200; Neal *vs.* Shinn, 49 Ark., 227; State *vs.* Williams, 48 Ark., 225; Grimet *vs.* Askew, 48 Ark., 151; Chapman *vs.* Holmes, 47 Ark., 414; Hamm *vs.* State, 22 Ark., 207; Brumley *vs.* State, 20 Ark.,

77; *Ex parte* Jones, 27 Ark., 349; *Ex parte* Osborn, 24 Ark., 379; Dunn *vs.* State, 2 Ark., 229; Bates *vs.* Gage, 40 Cal., 183; Clellan *vs.* People, 4 Colo., 244; American Fire Ins. Co. *vs.* Pappe, 4 Okla., 110; Irwin *vs.* Irwin, 2 Okla., 180.

It will be seen by referring to the record that there was no *place* designated by the Supreme Court, as required by the act of Congress, where the district court should be held. We contend that without that the court was not properly organized and was without power to organize a grand jury or a trial jury and try the petitioner.

ARGUMENT AND AUTHORITY UNDER THIRD PROPOSITION.

CAN THIS COURT GO BEHIND THE JUDGMENT AND CONVICTION OF THE TRIAL COURT AND RELEASE A PARTY IMPRISONED IN CASE THE UNCONTRADICTED RECORD SHOWS THAT HIS IMPRISONMENT IS ILLEGAL?

In the case of *Ex parte* Neilson, 131 U. S., page 182, opinion delivered by Mr. Justice Bradley, he states:

"The objection to the remedy of *habeas corpus* of course would be that there was in force a regular judgment of conviction which would not be questioned collaterally, as it would have to be done in *habeas corpus;* but there are exceptions to this rule which have more than once been acted upon by this court. It is firmly established that if the court which rendered the judgment had not jurisdiction to render it, either *because the proceedings* or the law under which they are taken are unconstitional, *or for any other reason* the judgment is void, and may be questioned collaterally and the defendant who is imprisoned under and by virtue of it may be discharged from custody in *habeas corpus.*"

Citing *Ex parte* Lang, 18 Wall., 163; *Ex parte* Seibold, 100 U. S., 371.

Quoting again from the decision, on page 183, the court uses this language:

"In other words, a constitutional *immunity* of the defendant *was violated* by the second trial and judgment. It is difficult to say whether a conviction and punishment under an unconstitutional law is *more violative* of a person's constitutional rights than an *unconstitutional* conviction and punishment under a valid law. In the first place it is true the court has no authority to take cognizance of the case at all, but in the other it has no authority to render judgment against the defendant."

And again, on page 184, it is stated:

"It was not a case of *mere error* in law, but a case of denying a person a *constitutional right*, and if we have seemed to hold to the contrary in any case it has been from inadvertence."

We contend that the doctrine announced here applies to the case at bar; that while it is a case of error, yet it is such error that renders the judgment of the court void. Every void judgment includes an erroneous judgment, but every erroneous judgment does not necessarily make the judgment void.

The same doctrine was also announced *In re* Mayfield, 144 U. S., 107-116, opinion delivered by Mr. Justice Brown. On page 116 we find this language:

"The point is taken in the brief submitted by the Attorney General that the Supreme Court has no power to consider this question upon application for writ of *habeas corpus*. This court has held, however, *in a multitude of cases* that it had power to inquire in regard to the jurisdiction of inferior courts, either in respect to the subject-matter *or the person*, even if such inquiry involves an examination of facts outside of but not inconsistent with the record."

Citing:

Ex parte Yerger, 8 Wall., 85; *Ex parte* Virginia, 100 U. S., 333; *Ex parte* Carrol, 106 U. S., 521; *Ex parte* Yarbrough, 110 U. S., 651; *Ex parte* Bigelow, 113 U. S., 328; *In re* Neilson, 131 U. S., 176; *In re* Cuddy, 131 U. S., 288; *Ex parte* Mayfield, 141 U. S., 107-116; *Ex parte* Bain, 121 U. S., 1; *In re* Swan, 150 U. S., 648.

Also see case of *In re* Nugent, 182 U. S., page ——, wherein a very elaborate opinion was handed down.

It has also been held by the district and circuit courts, under authority of *this court,* that under certain circumstances the record of the trial court may be contradicted, and the rule is laid down *In re* Elmira Steel Company, vol. 5, Amer. Bankruptcy Reports, p. 505, and cases decided by this court, cited to support same.

"The rule has long been settled that the jurisdiction of any court may be challenged in any other court where its decrees or judgments are relied on, and the record of the judgment may be contradicted as to the facts necessary to give the court jurisdiction, and if it is shown that such facts did not exist the record will be a nullity, notwithstanding it may recite that such facts did exist."

Adams *vs.* Terrell, 4 Federal Rep., 796.
Williamson *vs.* Berrn, 8 Peter (U. S.), 540.
Elliott *vs.* Piersol, 1 Peter (U. S.), 328.
U. S. *vs.* Arrondodo, 6 Peter (U. S.), 591.
Voorhees *vs.* Bank of U. S., 10 Peter, 475.
Wilcox *vs.* Jackson, 15 Peter (U. S.), 511.
Thompson *vs.* Whiteman, 18 Wall., 457.
Nooes *vs.* Gas Light & Coke Co., 19 Wall., 58.

Also to same effect see Brown on Jurisdiction, second edition, sections 101-103, pages 377-379.

ARGUMENT AND AUTHORITY CITED UNDER FOURTH, FIFTH, AND SIXTH PROPOSITIONS.

FIRST. WAS IT A PREREQUISITE TO A LEGAL CONVICTION OF THE PETITIONER THAT HE SHOULD HAVE BEEN INDICTED BY A LEGAL GRAND JURY?

SECOND. IF THE LEGISLATURE OF THE TERRITORY OF OKLAHOMA WAS WITHOUT POWER TO PROVIDE BY LAW FOR THE CONVICTION OF A PERSON CHARGED WITH A CAPITAL OR OTHERWISE INFAMOUS CRIME WITHOUT A LEGAL INDICTMENT, THEN IS THE COURT NOT LIKEWISE WITHOUT POWER AND AUTHORITY TO DISREGARD THE LAWS WHICH ARE IN HARMONY WITH THE PROVISIONS OF THE CONSTITUTION, AND BY THAT MEANS DEPRIVE ONE OF ITS CITIZENS OF THOSE FUNDAMENTAL RIGHTS WHICH THE LEGISLATURE HAD NO POWER TO DO?

THIRD. DID THE CIRCUIT COURT OF APPEALS ERR IN ITS DECISION IN HOLDING IN EFFECT THAT THE LEGISLATURE OF OKLAHOMA COULD HAVE PROVIDED BY LAW FOR THE CONVICTION OF THE PETITIONER WITHOUT THE INTERVENTION AND INDICTMENT OF A GRAND JURY?

As these questions are all related, we desire to argue them together.

We contend that it is well settled that the legislature of the Territory of Oklahoma, as well as the legislature of all other organized Territories of the United States, is without power to pass a law providing for the trial, conviction and punishment of one of its citizens charged with a capital or otherwise infamous crime without the intervention and presentment of a bill of indictment by a legally constituted grand jury. If this be true, and we take it that it will be conceded, and if not conceded it will be declared to be the law by the court, then

how can the trial court or judge condemn a citizen of the Territory and sentence him for life by disregarding the laws enacted by the local legislature for its guidance, and in that manner deprive a citizen of those fundamental rights which the legislature is prohibited from doing? This, it seems, will be placing the judge and the trial court above the law and placing within the breast of each judge not only the right to legislate for his own court, but the power to suspend or repeal legislation, and that without any power lodged anywhere in the Government to interfere and correct such oppressive proceedings. This in effect is what the Circuit Court of Appeals for the Eighth Circuit held in the case at bar when this case was before it on petition for writ of *habeas corpus*. The learned judge who wrote and delivered the opinion of that court used this language:

"The statute of Oklahoma requires grand jurors to be *qualified electors* and to be *drawn from lists selected* by the *judges* of *election*. Some, if not all of those who acted as grand jurors *were not such electors*, were not *residents* or citizens of the county, and perhaps were otherwise disqualified. * * * The only provision of the Constitution which may relate in any way to the acts of the trial court here under consideration are: '(1) No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. (2) Nor be deprived of life, liberty or property without due process of law.' (Amendments to Constitution, article 5.) But the Supreme Court has decided that the trial, sentence and confinement of a person for murder in accordance with the Constitution and laws of a State without a presentment or indictment by any grand jury whatever is not a violation of either of these provisions of the Constitution."

Citing:

Harlado *vs.* California, 110 U. S., 516.
McNulty *vs.* California, 149 U. S., 645.

"The United States by the organic act of the Territory of Oklahoma empowered its legislature to enact any laws which were not in conflict with the Constitution and laws of the

United States. (1 Stat. Oklahoma, p. 73, sec. 66.) Neither the Constitution nor the laws of the United States prescribe the qualifications or the method of selection of grand jurors in the Territories, and the legislature of Oklahoma, therefore, had plenary power over these subjects."

Citing:

Clinton *vs.* Englebrecht, 13 Wall., 434-448.
Hornbuckle *vs.* Toombs, 85 U. S., 648.
Good *vs.* Martin, 96 U. S., 90-98.

"The conclusion necessarily follows that if the legislature of Oklahoma had prescribed the method of selecting grand jurors which the court adopted, and the qualifications which those who found the indictment actually possessed the course of the trial would not have constituted a violation of any provision of the Constitution of the United States, and if this be true it is difficult to perceive how this course could have constituted such a violation or more than irregularity of errors of law in the absence of such legislation."

It will be seen that that court virtually holds that the territorial legislature and the territorial courts stand in the same relation to the Federal Government as do State legislatures and State courts. It holds in effect that the Territory could, by an act of its legislature, provide for the trial, conviction and punishment of one of its citizens for murder without an indictment of a legal grand jury, or could provide by law for a grand jury of less than were necessary to make a presentment under the common law, and could provide for a conviction by a trial jury of less than twelve; and had the court proceeded in accordance with that law and the jurors had been qualified as required by such law, then it would have been no violation of the provisions of the Constitution and would have no ground for releasing on writ of *habeas corpus*. The court could have arrived at the conclusion on no other ground except that the fifth and sixth amendments to the Constitution had no application to the Territories, for the reason they did not apply to the different States. We contend

that this is in direct conflict with the decisions of this court as laid down in the case of Thompson *vs.* Utah, 170 U. S., 344, opinion of the court delivered by Mr. Justice Harlan. It was stated in the opinion, referring to the case of First National Bank *vs.* County of Kankton, 101 U. S., 129:

"It was stated that Congress in virtue of the sovereignty of the United States could not only abrogate the laws of territorial legislatures, but might itself legislate directly for the local Government. That it had full and complete legislative authority over the people of the Territories and all the departments of the territorial government; that it might do for the Territories what the people, under the Constitution of the United States might do for the States."

It will be noticed by the court, too, that the organic act of Utah is a little different from the organic act of the Territory of Oklahoma, in this: that it declares that the legislative powers of said Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of the act, while the organic act of Oklahoma Territory provides that the legislative powers shall extend to all rightful subjects of legislation *not in conflict* with the Constitution of the United States and the organic act.

Again the court stated:

"If one on trial for a felony, the punishment of which is confinement in the penitentiary cannot legally consent that the trial proceed in his absence, still less can he assent to be deprived of his liberty by a tribunal not authorized by law to determine his guilt. In our opinion the provision of the constitution of Utah providing for trial in courts of general jurisdiction of criminal cases by a jury composed of eight persons is *ex post facto* to the application of felonies committed before the Territory became a State, because, in respect to such crimes the Constitution of the United States gives the accused the right to be tried by a jury of twelve persons, and he cannot be deprived of his liberty except by the unanimous verdict of such a jury."

Also to same effect we cite cases of Webster *vs.* Reed, 11 Howard, 433-460; American Publishing Company *vs.* Fischer, 160 U. S., 464; Springville *vs.* Thomas, 166 U. S., 707.

We take it that it will not be contended that if the sixth amendment applies to the Territory and territorial courts the same as it does to the Federal courts that likewise the fifth amendment will apply, and that the legislature of Oklahoma was as much without power to provide by law for the trial and punishment of a person charged with a capital offense without an indictment of a legal grand jury, as provided by the fifth amendment to the Constitution and as understood and defined by the common law at the date of the adoption of that instrument, as it was to provide for the trial and punishment of a person charged with such offense by a trial jury of less or greater number than twelve, as provided by the sixth amendment to the Constitution.

It stands as an admitted fact in this case that the court not only failed to comply with the law in the matter of selecting, summoning and empaneling the grand jury, but that the court and the other officers required by law to participate in the selection, summoning and organizing of said grand jury *wholly* and *openly disregarded* the law and that none of said persons composing said grand jury were *electors* of *said Territory,* as required by law in order to be qualified jurors, and many of them were *non-residents* of said county and Territory at said time, and were each and all disqualified to sit on a grand jury in said Territory. Also it is alleged on page 5 of the record that the same facts applied to the *trial jury,* which is likewise admitted.

If the proceedings of the trial court, as admitted by the record in this case, can be upheld and it be determined that there is no power to interfere and check such proceedings, then it seems it would be well to amend the Constitution and provide that the mode of procedure, the manner of selecting jurors, and the qualifications, etc., in criminal trials should be committed to the discretion and conscience of the trial judge and that his decision should be final.

ARGUMENT AND AUTHORITIES CITED UNDER SEVENTH AND EIGHTH PROPOSITIONS.

FIRST. WAS THERE A LOCAL LAW OF THE TERRITORY IN FORCE PROVIDING FOR SELECTING, EMPANELING, AND ORGANIZING A GRAND JURY AND PRESCRIBING THE QUALIFICATIONS OF SAME, AND WAS SUCH LAW IN CONFLICT WITH THE COMMON-LAW PROCEDURE?

SECOND. WAS SUCH PROCEDURE, AS PRESCRIBED BY THE LOCAL STATUTE, EXCLUSIVE?

THIRD. THE FAILURE OF THE COURT TO SUBSTANTIALLY FOLLOW THE PROVISIONS OF THE STATUTE AND IN PURPOSELY DISREGARDING THE STATUTE IN THE MANNER OF ORGANIZING A GRAND JURY RENDERS THAT BODY AND ITS PROCEEDINGS VOID!

THE MODE OF PROCEDURE PRESCRIBED BY THE STATUTE WAS EXCLUSIVE.

As will be seen from the sections of the statute hereafter quoted under the ninth proposition, the law in reference to selecting, empaneling and organizing a grand jury was complete, and, as held by the Circuit Court of Appeals for the Eighth Circuit in the case of Sharp *vs.* United States, 138 Federal, 878, is specific and mandatory and the court had no power to disregard it.

It was held by this court in the case of Clinton *vs.* Englebrecht, 13 Wall., 434-448, that the trial court had no authority to summon a petit jury upon an open venire until the local statute had first been complied with and exhausted; that the order in such cases was unauthorized and void, and that the trial jury was likewise void and without authority to render a verdict. While we concede, and not only concede,

but insist, that the legislature of Oklahoma had plenary power to prescribe the qualifications of both grand and petit jurors, and had authority and power to prescribe the number composing the grand jury so long as it was not in conflict with the number required to find a bill under the common-law procedure, as was understood at the date of the adoption of the Constitution, we further insist that said law was exclusive and binding upon the courts and the court was without any power or authority to disregard the same, and the court had no authority to undertake or attempt to resort to the common-law method until the statute had first been complied with and the method there provided for exhausted. The court having made no attempt to comply with the statute, but openly and purposely disregarding the local statute, not only as to the mode of procedure and the manner of selecting and summoning the same, but also as to the *qualifications* of the persons attempted to be organized into the grand jury as well as the *petit jury* that tried the petitioner, we contend that for these reasons the same was an illegal body, without authority to make presentments, and that its proceedings were wholly void and insufficient to give the court jurisdiction over the petitioner.

The above propositions will also find support in the case of Crowley, plaintiff in error, *vs.* United States, on writ of error from the United States court in Porto Rico to this court, decided May 13, 1904. Mr. Justice Harlan delivered the opinion of the court. After referring to section 1025 of the Revised Statutes the court stated:

"This section can have no bearing on the present case for the disqualification of the grand jury is prescribed by statute and cannot be regarded as a mere defect or imperfection in form. It is a matter of substance and cannot be disregarded without prejudice to the accused."

The statutes of Oklahoma in reference to a grand jury repealed the common-law method.

"When the common law and the statute differ the common law gives place to the statute."

State *vs.* Norton, 23 N. J., 33.

We also find the above supported by the following decisions:

Bent *vs.* Thompson, 5 N. H., 408 (23 Pac. Rep., 234).

Browning *vs.* Browning, 2 N. Mex., 371 (9 Pac. Rep., 677).

Feitensdorfer *vs.* Webb, 1st N. Mex., 345.

McKinner *vs.* Winn, 1 Okla., 327; 33 Pac., 582; L. R. A., 501.

Utah First Nat'l Bank *vs.* Kinner, 1 Utah, 100.

People *vs.* Greene, 1 Utah, 11.

Luhr *vs.* Hancock, 811 U. S., 567.

Pyeatt *vs.* Powell, 51 Federal, 561.

"The common law is impliedly repealed by a statute which is inconsistent therewith, or which undertakes to revise and cover the whole subject-matter."

Ninth Enc. Law & Procedure, 376. Citing cases in Colorado, Delaware, Louisiana, Maine, Massachusetts, Missouri, New Hampshire, New York, Ohio, Arkansas, California, Illinois.

"Where in the statute, the performance of the act is limited to the particular form or manner it excludes every other form or manner."

Dist. Tp. City of Dubuque *vs.* City of Dubuque, 7 Ia., 262.

"Where the statute to attain a particular object prescribed the mode to enforce it, such mode must be pursued."

In re Hughes, 1st Bland, 46.

"Criminal statutes cannot be extended to cases not included within the clear and obvious import of their language."

U. S. *vs.* Clayton, Federal case 14814.

Also case of Territory *vs.* Carmody, 45 Pac., 881.

In McGann *vs.* Hamilton (Conn.), 19 Atl., 376, it was held that where a statute provides the manner of selecting a jury all other ways are *impliedly prohibited.*

It was held in the case of Bannigan *vs.* State, 24 Pac., 768:

"In the face of the statute the common-law grand jury cannot be selected."

It was not a question of the inherent power of the court, because there is no court that has sufficient inherent power to authorize it to disregard the plain provisions of the law and absolutely disregard the law and act in contravention of plain statutes, and in that manner give itself jurisdiction.

ARGUMENT AND AUTHORITY UNDER EIGHTH PROPOSITION.

WAS THE INDICTMENT UNDER CONSIDERATION, AS SHOWN BY THE RECORD, IN ANY SENSE VALID AND SUFFICIENT TO GIVE THE COURT JURISDICTION?

In the case of *Ex parte In re* Bonner, on petition for writ of *habeas corpus* in this court, reported in 151 U. S., 254, Mr. Justice Fields delivering the opinion of the court, it is stated:

"We are unable to agree with the learned counsel, but are of the opinion that in all cases where life or liberty is affected by its proceedings the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and render judgment. It cannot pass beyond these limits in any essential requirement *in any stage of the proceedings.*"

And again:

"It is plain that such court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction; and when in taking custody of the accused and in its modes

of procedure in the determination of the question as to his guilt or innocence and in rendering judgment the *court keeps within the limits prescribed* by the *law*, customary or statutory. When the court *goes out* of these limits its action to the extent of the excess is void."

And again:

"If the offense be a felony the accusation in a Federal court must be made by a grand jury summoned to investigate the charge of the public prosecutor against the accused. Such indictment can only be found by a *specified number* of the grand jury. If not found by that *number* the court cannot proceed at all."

We desire now to refer to the different decisions from the Supreme Courts of the different States as to the illegality of the indictment in question.

In the case of Levy *vs.* Wilson, 60 Cal., the court used this language:

"One of the grounds stated in the petition is that the indictment was found by a body of men styled 'a grand jury.' If that be so the accusatory paper returned by them in the court below is worthless, and void, and the court had no jurisdiction to try the plaintiff upon it."

Citing People *vs.* Thurston, 5 California, 69.

Also case of Bruner *vs.* Supreme Court of San Francisco, reported in 92 Cal., 239. This case came up on an application for writ of prohibition to prohibit the trial court from trying the petitioner upon an indictment claimed to be void, for the reason a special officer was appointed by the court to summon the grand jury, not provided for by law. The court in that case stated:

"It is contended that no matter how a body of men may have been gathered together its acts cannot be attacked if it be recognized by the court as a 'grand jury,' upon the principle sometimes applied to the acts of *de facto* public officers. It would indeed be startling if a man could be put to the

partial ignominy and hazard of a trial at the will of a set of men whom the court might choose to style a grand jury. But the current doctrine on that subject was clearly stated by this court in Levy *vs.* Wilson, 60 Cal., 105; also in People *vs.* Thurston, 5 Cal., 69, the same rule was stated, where the court said: 'I regard the indictment thus found by an illegally constituted body as *worthless, and all proceedings based upon it void.*"

Also in People *vs.* McNamara, 3 Nev., 75, the court states:

"An indictment found by a jury not legally constituted *cannot be valid.*"

Also in the case of McEvoy *vs.* State, 9 Neb., 163, it is stated:

"The grand jury must be selected in the manner prescribed by law. There is no security to the citizen, but *in a rigid adherence to the legislative will as expressed in the statute* for our guidance."

Also in the case of Stokes *vs.* State, 24 Miss., 623, it was held that a grand jury consists of the requisite number of competent individuals selected, summoned, empaneled legally and sworn *according* to the *forms of law,* and if the law be not followed the grand jury is incompetent to perform legal acts.

To the same effect it was held in the case of Raiey *vs.* State, 10 Texas Appeals, 481, where the court stated:

"A valid indictment is an indispensable prerequisite to a legal prosecution for felony."

Also to same effect see Finley *vs.* State, 61 Ala., 201; Nordan *vs.* State, 39 Sou. Rep., 406 (Ala.), where it was held that the indictment was void.

Also to same effect: State *vs.* Feizzell (La.), 38 Sou. Rep., 444; State *vs.* Mercer, 61 Ala., 220, where the indictment was held to be void.

In the case of United States *vs.* George Reynolds, reported in 1 Utah, 226, the court uses the following language:

"The principal difficulties in the case arise in reference to the constitution of the grand jury which found the indictment upon which conviction was had. The indictment was found by a grand jury of twenty-three men under the United States statutes. The territorial statute provides for a grand jury of fifteen men. The court held that the statute must be followed and reversed the case."

Also to same effect see case of Burley *vs.* State, 1 Neb., 390.

In the case of Dutell *vs.* State (Iowa), 4 Greene, 125, it is stated:

"It is true as a general rule that when the indictment is duly exhibited in open court and endorsed a true bill, it is evidence that it was duly found by a legal jury, but when the records of the court show that the grand jurors were not legally selected and had no authority to act it is evidence of a higher grade and shows that the indictment could not have been found, exhibited and endorsed by legal authority."

In the case of Thorp *vs.* People, 3 Utah, 441, it is stated:

"Were the grand jury summoned in a manner prescribed by statute, since if they were not *they had po power* to find a valid indictment."

On page 442 the court states:

"The manner of summoning, the time required, the mode of selecting are all expressly laid down, leaving nothing to be implied or in doubt. The law is explicit and *must* in *every* respect be complied with."

In the case of State of Louisiana *vs.* Singleton Parks, reported in 21 La., 251, opinion delivered by Chief Justice Ludeling, the question was raised in this case after conviction that one of the grand jurors who participated in finding the bill was not a citizen of the United States nor a duly qualified voter under the law of the State. The court stated:

"It appears from the record that Robert Coulter, one of the persons composing the grand jury was incompetent, and that this fact was not known to the defendant until after the trial. Can this objection be urged after verdict. Quoting from Mr. Wharton 'A new trial would be granted at common law where it appears after verdict that some one of the jurors should not have been permitted to sit upon the trial on account of an entire legal incapacity.' "

Citing Wharton, sec. 923; State *vs.* Babcock, 1 Conn., 401.

And then the court proceeded to quote from Hawkins' Pleas of the Crown, book 2, chapter 25, sections 26, 27, 28:

" 'That if any one of the grand jury who find an indictment be within one of the exceptions of the statute he vitiates the whole, though ever so many unexceptionable persons joined with him in finding it.' We feel satisfied that this construction furnishes the nicest and safest rule of decision, and that the incompetency of one of the grand jurors so to find a bill of indictment *vitiates* the whole proceeding. One of the qualifications of a grand juror in Louisiana is that he shall be a qualified elector of the State of Louisiana (Acts of 1868, No. 110). Coulter not being a qualified elector of the State was not a competent juror and a bill of indictment found by a grand jury of which he was a member *was a nullity.*"

In the case of Wm. Nichols at suit of the State, 5 N. J., 543, the court stated:

"The defendant can only be put to answer an indictment legally found and presented. A grand jury has no authority to inquire and present unless legally empaneled. * * * It has no right to present, nor are its presentations *sufficient* to put the *defendant on trial.*"

In the case of Crouch *vs.* State of Alabama, 63 Ala., 161, after the panel had been exhausted and an insufficient number to complete the jury, the trial court, instead of having the sheriff summon from the qualified voters of the county, as required by law, ordered him to summon five talesmen to

complete the jury. The court held that the indictment should have been quashed.

In the case of Doyle *vs.* State, 17 Ohio, 224, it was held that an indictment found by a grand jury composed of fourteen members was *void,* as there was no grand jury, the law requiring fifteen. The court further stated:

"No objection comes too late which discloses the fact that a person had been put to answer a crime in a *mode violating his legal and constitutional rights.* The doctrine of waiver has nothing to do with criminal prosecutions of this kind."

Citing Vatter *vs.* State, 4 Black (Indiana).

In the case of McQuillan *vs.* State, 8 S. & M., after reciting the provisions of the law relative to grand jurors, the court said:

"In view of these several provisions it is believed that a grand jury composed of members who do not *possess* the *requisite qualifications,* or who have not been *drawn, summoned and empaneled* in accordance with the law *have no power* to find a valid indictment."

Stokes *vs.* State, 24 Miss., 621, wherein it was held:

"A grand jury summoned in any other mode than that directed by law has no authority to find an indictment, nor will the *act* of the court in *causing said jury* to be *empaneled supply the defect* as to their selection."

Citing State *vs.* Wilson, 5 Port. (Ala.), 130. In this case the court released on writ of *habeas corpus.*

It was held in the following cases that the grand jury must be selected, drawn and empaneled according to law to give the court jurisdiction in a criminal case:

Lott *vs.* State, 18 Tex. App., 627; People *vs.* Coffman, 24 Cal., 294; McMillan *vs.* State, 19 Tex. App., 48.

In Porter *vs.* State, 23 Miss., 578, it was stated:

"The court has no power to select a grand jury only as given by statute."

In 9th Enc. Law, 1 ed., p. 6, we find this language:

"Courts are strict in the observance of statutory regulations in regard to empaneling grand juries."

Several cases cited.

To same effect we cite Thompson & Merriman on Juries, sections 492-493-494-500-520.

Also case of United States *vs.* Antz, 16 Federal Rep., 119, wherein it was held that an order directed to the marshal of the wrong district would render a grand jury summoned thereunder and all its proceedings void.

We contend that the pretended indictment upon which the petitioner was convicted under all the authorities was no indictment at all; that it is the same as though he had been convicted without an indictment; that it was wholly insufficient to give the court jurisdiction over the person of the defendant, and that it will come within the scope of the language used by this court in the case of United States *vs.* Gale, 109 U. S., 71, through Mr. Justice Bradley. While it was held in that case that the errors there were mere irregularities and did not affect the jurisdiction of the court, yet it pointed out that in cases like the one now before the court the writ of *habeas corpus* would undoubtedly lie. The language used is as follows:

"There are cases, undoubtedly, which admit of a different consideration, and in which the objection to the grand jury might be taken *at any time*. These are: where the whole proceeding of forming the panel is void, as where the jury is not a jury of the court or term in which the indictment is found, or has been selected by persons having no authority whatever to select them, or where they have not been sworn, or where *some other fundamental requisite has not been complied with*. But there is no complaint of this kind in the present case."

We contend that the undisputed record in this case brings this case within the rule announced above.

ARGUMENT AND AUTHORITY UNDER NINTH PROPOSITION.

Section 2907 of Wilson's Annotated Statutes of Oklahoma:

"The term 'qualified elector' within the meaning of this act shall include all male persons of the age of twenty-one years or upward belonging to either of the following classes: who have *resided* in the Territory for a period of *six months*, in the township sixty days, and the voting precinct thirty days first preceding an election."

"SECTION 3308. All male persons *residing* in any of the counties of this Territory having the qualifications of electors, and being over the age of twenty-one years, and of sound mind and discretion, and not judges of the Supreme Court or district court, clerk of the Supreme Court or district court, sheriff, coroner, licensed attorneys engaged in practice, or any person licensed to sell liquor, or an habitual drunkard, and not subject to any *bodily infirmity* amounting to *disability*, and who have not been convicted of a criminal offense punishable by imprisonment in the penitentiary, etc., are and shall be competent persons to serve on all grand and petit juries, either in their county or subdivision, respectively.

"SECTION 3309. No jury shall be summoned except by order of the judge of the district court, who shall issue an order to the clerk of said court that a jury shall be summoned, and such order shall specify the number of petit jurors that shall be summoned and the time and place where they shall appear, and said order shall be issued at any time within thirty days before the first day of the term of district court, or at any time during the term of said court."

Section 3310 reads that the grand jury shall be summoned in the same manner provided for summoning petit jurors.

"SECTION 3313. It shall be the duty of the county clerk at the time the poll books are prepared to have printed thereon in blank form an oath to the following effect: 'We, the undersigned judges of election in and for district ——, do solemnly swear that when the polls are closed and at the time we make a poll of the votes cast we will examine the list

of names on the poll books and therefrom we will select —— names and return to the county clerk to serve as jurors. That in making such selection we will select only such persons as are to us known to be of good moral character and sound judgment, and of unquestionable integrity, and that we will not select any person in the habit of taking intoxicants, who has been convicted of any felony, or who is engaged in the sale of intoxicating liquors, or who is known to be a participant in or engaged in any unlawful business, or whom we believe could be bribed, or who are of doubtful qualifications as jurors, so held us God.'"

And the provision is then made for the jurat.

It is further provided that the county clerk shall, before the poll books are delivered to the election judges, estimate the number of jurors that will be required to be drawn from each election precinct. It further provides that when the election is over the judges of election shall examine the list of names on the poll books and select the number of persons designated by the clerk and possessing the qualifications required by the act to serve as jurors, and shall make a list of same and shall sign and return same to the county clerk.

It further provides that it shall be the duty of the county clerk to write the names so returned on slips of paper and place them in a box with lock and key and keep the same locked, and from the names so placed in this box the grand and petit jurors shall be drawn. Within ten days before the sitting of any term of the district court the judge shall certify to the district clerk the number of persons desired for the grand and petit jury, or both. Thereupon the clerk of the district court shall summon the sheriff, or any of his deputies, and the county clerk and shall take the box containing the names of jurors so returned and shall shake the same, and the box shall then be opened in the presence of all three of said officers, and placed in such a position that they cannot see into it. And then each officer shall in turn draw a name therefrom and make a record thereof until the required number of grand and petit jurors be drawn. The names first

drawn shall constitute the grand jury and the latter the petit jurors for the term to which they are drawn, and each slip containing the name drawn from the box shall be destroyed.

There is a provision made in this section to meet any emergency when the judges of election shall fail to make returns, as follows: "If from any cause the judges of election shall fail to make return of jurors for their precinct it shall be the duty of the county commissioners to take the poll books from that precinct and select the number of persons required to serve as jurors from that precinct, and in making such selection shall exercise the same care as required herein of judges of election, and the list so selected by the county commissioners shall be received in lieu of the one required to be made by the judges of election."

Said section further provides that it shall be the duty of the county clerk to prepare and have printed a sheet containing the law with regard to the qualifications of jurors and the directions to the judges of election and have same attached to the face of the poll books before the same are sent them.

There is another proviso made in this section to meet an emergency under other circumstances, as follows:

"*Provided, further,* That if the list of jurors as prepared under the provisions of this act is destroyed or lost it shall be the duty of the county clerk to immediately prepare lists as herein provided for and send such lists to each township and city assessor, who shall select from the tax-payers of his township or city the number of suitable and legal jurors as indicated by the clerk, and such assessor shall immediately return said list to the county clerk, and said county clerk shall from said list returned by said assessor prepare the jury list."

Under section 3314 it provides that any juror failing to appear who has been summoned shall be in contempt, etc., and further provides: "And if the judges of election or county commissioners of any county, willfully neglect or fail to select

and furnish to the clerk names of persons as hereinbefore provided, such person so offending shall be fined by the court not less than $5.00 nor more than $25.00; and if the clerk of the district, or deputy clerk, sheriff or deputy sheriff, or coroner shall neglect or fail to perform the duties imposed by this act the persons so offending shall be deemed guilty of contempt and shall be fined by the court not less than $5.00 nor more than $25.00, and if guilty of gross misconduct in disregarding the provisions of this Act may be imprisoned by the court no longer than thirty days in the county jail."

It can hardly be questioned that this statute is mandatory. The only excuse the court made for disregarding the statute is that there had been no election held at the time the grand jury was empaneled; or, in other words, the conditions were such temporarily that the court declared the law inapplicable at that time to that particular county. If we concede the court this power in one case it must be conceded in every case and to each trial court and to each judge presiding in each trial court, whenever in the opinion of the judge certain conditions exist making the local statute inapplicable, then he has the power and authority to disregard the statute, or repeal it, so to speak, for the time being, and call into existence the common-law procedure. It seems that this would be giving the trial court the most liberal and unlimited power, not only to legislate, but repeal and supersede statues.

It has proven to be true in the Territory of Oklahoma since the decision by the Circuit Court of Appeals for the Eighth Circuit in the case of Sharp *vs.* United States, above referred to, that there have been conditions existing in the different counties which rendered illegal most every grand jury theretofore provided for, tested by the decision in the Sharp case, and it was found necessary to secure an act of Congress to relieve the conditions, which was passed the last session, providing for a new method and mode of procuring grand jurors before the court could proceed with the criminal

business of the Territory. If the court has power to do what it did in this case, then the act of Congress was unnecessary, and the courts would only have had to declare the conditions such that the statutory law was inapplicable and proceed under the common law; but this, we think, is too utterly unreasonable for argument.

ARGUMENT AND AUTHORITY UNDER THE TENTH PROPOSITION.

DID THE TRIAL COURT IN THE CASE AT BAR OVERRIDE A PLAIN STATUTE AND DID THE PETITIONER DO ALL HE WAS CALLED UPON TO DO IN ORDER TO PROTECT HIS RIGHTS?

It is conceded that the indictment was not found according to statute.

It will be seen by referring to the record, page 19, that the petitioner filed his motion and set up in detail the reasons why the indictment should be quashed and set aside, as is shown by said motion made an exhibit to the petition. It is also shown from the record that the facts were conceded to be true.

It will also be seen by reference to page 6 of the record, ninth paragraph of the petition, that the petitioner was not present when the proceedings of the grand jury were had, and the first opportunity he had he presented his motion to have the indictment quashed.

Section 5399 of Wilson's Annotated Statutes of Oklahoma provides:

"The indictment *must* be set aside by the court in which the defendant is arraigned and upon his motion in either of the following cases (1), when it is not found, endorsed, presented or filed as prescribed by the statutes of the Territory or when the grand jury is not drawn and empaneled as provided by law and that fact is known to the defendant at or before the time the jury is sworn to try the case."

Section 5400 provides:

"If the motion to set aside the indictment be not made the defendant is precluded from afterwards taking the objections mentioned in the last section except the one that the jury was not drawn and empaneled as provided by law and that may be done as ground for a new trial when showing is made that these facts were not known to the defendant or his counsel until after the jury were sworn for the trial of the case."

We think the Circuit Court of Appeals for the Eighth Circuit in the case of Sharp *vs.* United States, above referred to, correctly held that this statute was beyond the discretion of the trial court; that after it was ascertained that the grand jury was not empaneled and sworn as required by law the court had no discretion, and when these facts were admitted to be true in refusing to set aside the indictment the court was simply acting beyond its jurisdiction and transcending a plain statute.

This motion was not only made and overruled by the trial court, but it will be noticed by the record that it was also made a ground for a new trial and motion in arrest of judgment, each of which was by the court overruled, and from these different judgments of the court an appeal was prosecuted. So it will be seen that he has exhausted every remedy known to him by the ordinary modes, and we contend that if a petitioner has ever placed himself in a position to come within the rule laid down by this court in *habeas corpus* proceedings the petitioner in the case at bar has done so.

We only desire to say further under this proposition that we think the record in this case shows conclusively that the petitioner has brought himself within the rules laid down by this court in the different cases cited and referred to in this brief, and that it is a proper case for his release by the writ of *habeas corpus.*

ARGUMENT AND AUTHORITY UNDER ELEVENTH PROPOSITION.

In section 9 of the act of Congress known as the organic act of Oklahoma, being section 69, page 75, 1st vol., Wilson's Annotated Statutes of Oklahoma, this provision is found:

"The Territory not embraced in organized counties shall be attached for judicial purposes to such organized county or counties as the Supreme Court may determine."

In section 10 of said act of Congress, section 70, page 77, of Wilson's Annotated Statutes, we find this provision:

"All offenses committed in said territory if committed within any organized county shall be prosecuted and tried within said county, and if committed within territory not embraced in any organized county shall be prosecuted and tried in the county to which said territory shall be attached for judicial purposes."

It will be seen from these quotations that the condition of this particular portion of the territory wherein said alleged crime was committed at the date of the commission thereof—that is to say, whether it was or was not an organized county—fixed the venue and place of trial.

Further on in this section it provides that even a civil suit arising in a portion of the territory not embraced in an organized county must be instituted in the county to which said territory is attached for judicial purposes.

It is admitted that at the date of the commission of this crime this portion of the territory was a portion of an unorganized county and was not embraced in any organized county, but that the same was on said date attached to Canadian county for judicial purposes; that there had been no law of any kind changing the place of trial or in any way affecting the order of the Supreme Court attaching the same to Canadian county. It was not a question of a division of a county wherein provisions are made for the trial of pending

cases, but simply a question of construction of the act of Congress, and as the act is plain and unambiguous it will fall within the general rule of the construction of statutes, and that is that there is no construction to be placed upon it except the plain import of the language used.

We contend that the only question is, Did Congress have authority and power to fix the place of trial of criminal cases, as it undertook to do under this provision? We take it that this, however, will not be controverted, as being a crime committed out of the jurisdiction of any State, that under the Constitution Congress might provide for the prosecution and trial at any place.

We think the case of George W. Post *vs.* United States, reported in 161 U. S., Book 40, p. 816, is somewhat in point; however, the facts and conditions were not the same, but the same principle is adhered to.

We contend that it being not denied that at the date of the alleged commission of the crime for which the petitioner is charged that particular portion of the territory wherein the same was committed was an unorganized county, and it having theretofore been attached to Canadian county for judicial purposes under the act of Congress, the venue was as much within Canadian county as though the Congress of the United States had provided in so many words that "all crimes committed in that portion of the territory prior to August 6, 1901 (the date of the opening of the county), shall be prosecuted and tried in Canadian county." It seems to us too plain for argument.

ARGUMENT AND AUTHORITY UNDER TWELFTH PROPOSITION.

Section 5339 of the Revised Statutes of the United States provides as follows:

"Every person who commits murder (1) within any fort, arsenal, dock yard, magazine, or within any other place or district of country under the exclusive jurisdiction of the United States. * * * Shall be guilty of murder, and punished," etc.

The petitioner alleges that this alleged crime was committed on the 4th day of August, 1901, two days prior to the opening of the Kiowa-Comanche-Apache Indian reservation for settlement; that on said day and date and at all times prior thereto it was under the exclusive jurisdiction of the United States; that, recognizing that jurisdiction, the Government did in fact exercise jurisdiction over said country where said alleged crime was committed on the 4th day of August, 1901, and, recognizing the fact that it was a crime against the Government of the United States, the United States attorney appeared and conducted the prosecution of said crime charged against the petitioner.

While the petitioner does not contend that these facts are conclusive that it is a crime against the Federal Government, yet our contention is that although the law had been passed for the opening of this country for settlement, yet until the country was actually opened for settlement it was still under the exclusive jurisdiction of the United States Government; that Congress could have at any time passed another act, prior to the opening of the country for settlement, and repealed that act and could have withdrawn said country from settlement indefinitely, or could have reserved it perpetually for an Indian reservation or for military purposes, or for any purpose the United States might desire to use the same, and said country did not pass out from under the control and

power of the Government until it was actually opened up for settlement on August 6, 1901.

We think it is clear that the Government did rightfully exercise exclusive control and jurisdiction over that portion of the country up until the 6th day of August, 1901, as shown by the President's proclamation, issued on the 4th day of July, 1901. The proclamation reads as follows:

"Now therefore, I, William McKinley, President of the United States of America, by virtue of the power vested in me by law, do hereby declare and make known that all of the lands so as aforesaid ceded by the Wichita and affiliated bands of Indians, and the Comanche, Kiowa, and Apache tribes of Indians, respectively (saving and excepting the different tracts of land reserved for different purposes), will on the 6th day of August, 1901, at 9 o'clock a. m., after the manner herein prescribed and not otherwise, be opened to entry and settlement and disposition under the general provisions of the homestead and town-site laws of the United States."

Another provision contained in said proclamation:

"Each applicant who shows himself duly qualified will be registered and given a *non-transferable certificate* to that effect, which will *enable him to go upon and examine the lands to be opened* up within the land district in which he elects to make his entry, but the *only purpose for which he may go upon and examine said lands* is that of enabling him later on, as herein provided, to intelligently select the land for which he will make entry. No one will be permitted to make settlement upon any of said land in advance of the opening herein provided for," etc.

And again, another provision:

"All persons are especially admonished that under said act of Congress approved March 3, 1901,, it is provided that no person shall be permitted to settle upon, occupy, *or enter any of said ceded land* except in the manner prescribed in this proclamation," etc.

This seems to us to be conclusive of the fact that the construction placed upon the law by the President of the United States was that it was under the exclusive jurisdiction of the Federal Government until the country was actually opened for settlement. While this would not be conclusive upon the court, yet it would be persuasive, and certainly if this particular portion of the country was not under the exclusive jurisdiction of the United States the President nor any other official of the Government would have had no right to restrict the free movement of any United States citizen within and upon this land, and while it may have ceased to be an Indian reservation after the approval of the act of Congress ratifying the agreement with those tribes, yet still if it was under the exclusive jurisdiction of the United States a crime committed there would nevertheless be a crime against the Federal Government.

The only question is whether or not it was under the exclusive jurisdiction of the United States on August 4, 1901. If so, then it needs no authority to convince the court that it was a crime against the Federal Government and not against the territorial government, and we think it not necessary to prolong this portion of the argument or to cite any other authority in support thereof.

ARGUMENT AND AUTHORITY UNDER THIRTEENTH PROPOSITION.

DOES THE RECORD SHOW THAT THE PETITIONER WAS COMPELLED BY THE COURT TO FURNISH EVIDENCE AGAINST HIMSELF?

It will be noted that the petition alleges that one of the main contentions of the Territory in the trial of the petitioner herein was that one of the parties who participated in the highway robbery and murder of Joseph Philip Beenblossom was of a certain height, a certain build and weight,

of a certain appearance, and had a peculiar walk; that these facts were detailed by the witnesses for the prosecution before the jury, and that in order to more thoroughly establish said contention the petitioner was compelled, over his objection, to stand up, exhibit himself, and walk before the jury, and that the jury was stationed during the recess of the court, outside of the court-room and between it and the jail, by the officer in charge, for the purpose and in order that they might take notice of the petitioner and his peculiar walk as he was carried by them by the officer, and that they did in fact take such notice and observed his walk and general appearance, size, etc. We contend that this comes within the inhibition of the fifth amendment to the Federal Constitution. While it is not testimony in words, yet it is in fact the strongest character of testimony, extorted from the petitioner by the court over his objection.

It was one of the petitioner's constitutional rights to remain silent and with his arms folded during the progress of the trial, and he could not have legally been forced and compelled in any way to contribute by either words, acts, or conduct in furnishing evidence for his conviction. To establish the identity of the petitioner it was necessary for the Territory to produce witnesses, which was done, to try to identify the persons guilty of the commission of the crime charged, and, as ordinarily true in such cases, this character of testimony is necessarily opinion testimony and is not relating facts as ordinarily understood by that term. Witnesses usually try to identify the defendant as comparing him with the person they saw at the place and during the commission of the crime. This was the character of the testimony introduced by the Territory on the trial of the petitioner. Witnesses related before the jury, as shown by the petition, the size of the party alleged to be the petitioner, his peculiarities, his weight, height, and peculiar walk, which they claimed one of the parties had. Then the Territory not being satisfied with the identity of the party or

feeling that the jury might not be thoroughly convinced of that fact, the petitioner then, in order to corroborate the witnesses for the Territory, was forced and compelled, over his objection and protest, to stand before the jury in order that they might measure him and for the purpose of weighing him in their own minds, and walk, for the purpose of detecting his peculiar walk, and by that means compared him—his actual appearance, size and peculiarities—with the story related by the witnesses, in order to make up their minds or verdict as to the identity of the petitioner. This, it seems to us, was the strongest character of testimony, and the petitioner, against his will and over his objection, was forced and compelled to contribute to his own conviction, which we claim is inhibited by the fifth amendment to the Constitution.

We realize that there is a cantrariety of opinion by the different courts upon this proposition, but we are forced to the conclusion that it has arisen by reason of the difference in language used in the different State constitutions and from the circumstances of each case, and that in reality there is but little conflict as to the application and the soundness of the doctrine contended for by the petitioner. Many courts have held in cases that it was not invading the defendant's constitutional rights by reason of the fact that the court permitted the defendant to stand up and be exhibited to the jury, but when they were examined closely it is on the ground that the defendant had complied with the request of the prosecutor or the court without making any objection and thereby waived his constitutional right. In other cases it was held that it was not an invasion of the defendant's constitutional right for the reason the wording of the Constitution was that the defendant should not be compelled "to testify against himself in criminal cases," and this is construed to mean oral testimony, by words and not by acts; but we don't believe there is a case on record where the provision of the Constitution is worded as it is in the fifth

amendment to the Federal Constitution and where it has been construed as that provision has been by this court in the case of Boyd *vs.* United States, 116 U. S., 616-641, where the trial court has forced the defendant to exhibit himself and stand before the jury for the purpose of identification and corroboration, that the court has not held it was error and an invasion of his constitutional right.

Many other cases have gone to the Supreme Courts of the different States where witnesses while testifying have been requested by the prosecutor to point out the defendant, and in cases where the defendant has been requested to stand and allow the witness to see him, which request was complied with without any objection at the time, but where counsel afterwards made objection in the cases and raised it on appeal that it was an invasion of his constitutional rights, and in these cases the courts have decided that simply the pointing to the defendant by the witnesses was not compelling him to give evidence against himself or to be a witness against himself, or that if the defendant was requested to stand up for the purpose of identification that he had done so without objection.

In vol. 16, 2d ed., Enc. Law, p. 818, under head of "Inspection and physical examination," the writer states:

"In England it has been held that the compulsory examination of the person of the defendant in a criminal case cannot be ordered, and there have been decisions to the same effect in the United States, though the contrary has been held."

Citing:

Agnew *vs.* Jobson, 13 Cox C. C., 621.
Blackwell *vs.* State (Ga.), 3 Crim. L. Mag., 393.
People *vs.* McCoy (Sup. Ct.), 45 How. (N. Y.), 216.
State *vs.* Jacobs, 5 Jones (50 N. C.), 259.

It was held in the case of Day *vs.* State, 63 Ga., 667, that the defendant could not forcibly be compelled to place his

foot in the footprints near the scene of the crime, as that would be compelling him to incriminate himself by acts.

In People *vs.* Mead, 50 Mich., 228, it was held that the defendant could not be required, against objection, to try on a shoe to determine whether the tracks found at the scene of the offense were his own.

In Stokes *vs.* State, 5 Baxter (Tenn.), it was held it was improper for the prosecuting attorney to place a pan of soft earth in front of the jury and request the defendant to make a footprint in it.

In vol. 30, 2d ed., Enc. Law, under head of "Witnesses," p. 1160, the writer states:

"It is generally held that it is a violation of the constitutional privilege of the witness to compel him to submit to a physical examination or to make experiments in the presence of the jury which tend to criminate himself."

Citing:

Cooper *vs.* State, 86 Ala., 610; 11 Amer. St. Rep., 84.
Davis *vs.* State, 131 Ala., 10.
State *vs.* Garrett, 71 N. C., 85; 17 Amer. Rep., 1.
State *vs.* Graham, 74 N. C., 626; 21 Amer. Rep., 493.
Walker *vs.* State, 7 Tex. App., 245; 32 Amer. Rep., 595.
State *vs.* Nordstrom, 7 Wash., 506.

Quoting from Underhill on Criminal Evidence, page 65, section 53, under definition of "Real evidence:"

"Real evidence means evidence which is obtained through the sight by the actual inspection of the person or thing by the judge or jury in open court. * * * The question is when may the accused be compelled to submit to an examination by the jurors. Inspection and comparison of persons by the jury have been frequently allowed where race or color was in issue. This is wholly unobjectionable if the accused shall consent thereto or if he desired to introduce the evidence in his own behalf. * * * Hence it has been

held that the accused not being a witness cannot be compelled to stand up before the jury in order that they may ascertain from inspection to what race he belongs."

Citing State vs. Jacobs, 5 Jones (N. C.), 259.

Some of the courts have held that it was not an invasion of the defendant's constitutional right for the defendant to stand up at the request of the court in order that the witness might look upon him, on the theory that the orderly conduct of a criminal trial required that the court should have full power to say what place the prisoner should occupy, when he should stand or sit, and where he should remain in the presence of the court and jury, etc. Or, in other words, that the prisoner has not the constitutional right to sit in any particular position or in any particular place in the court-room in the presence of the court and jury. This is probably true, yet it is an entirely different thing from what was done in the case of the petitioner, when he was not requested to stand for the purpose of a witness looking upon him, but was exhibited and required to stand, exhibit himself, and walk before the jury for the purpose of identification, that they might compare him with the person described by the witnesses on the witness stand. It was not done for the purpose and in order to facilitate the business of the court, or was not necessary for any other purpose except for the sole purpose of furnishing testimony for the Territory for the identification of the person described by the witnesses as guilty of the commission of the crime charged.

Again, on page 67, section 54, Underhill on Criminal Evidence:

"The accused cannot object if he is identified without being required to stand. So, if he voluntarily stands up and the witness identifies him, without objection, he cannot be granted a new trial upon the ground that he has been compelled to testify against himself."

It has always been the rule in the English courts, and in the absence of a written constitutional provision inhibiting such, that the accused cannot be compelled to give evidence against himself.

We find that the leading case denying the court the right to compel a person, over his objection, to stand and exhibit himself before the jury as invading his constitutional rights is the case of State *vs.* Jacobs, 5 N. C., 259, above cited.

There have been a number of cases decided in the same State subsequent, wherein they have held that it was not error in the trial court; but in each of them they take occasion to distinguish them from the Jacobs case, and that case so far has never been overruled by any subsequent decision, and by distinguishing the cases subsequently decided by the court upon that point it has the effect to approve this decision.

We also find upholding the same doctrine the following cases:

Blackwell *vs.* State, 67 Ga., 76.
Stokes *vs.* State (Tenn.), 5 Baxter, 619; 30 Amer. Rep., 72.
Rice *vs.* Rice, 11 L. R. A., 591; 47 N. J. Eq., 559.
Day *vs.* State, 63 Ga., 667.
People *vs.* McCoy, 45 Howard, 216.
People *vs.* Walcott, 51 Mich., 612.
People *vs.* Mead, 50 Mich., 228.
Emery *vs.* Case, 117 Mass., 181; 9 Amer. Rep., 22.

We also find the leading case in America holding to the opposite rule and upholding the right is the case of State *vs.* Ah Chuey, 14 Nev., 79; 33 Amer. Rep., 550; but in this case there was a very elaborate dissenting opinion holding that such was against the provision of the Constitution, and that distinction was drawn between constitutional provisions prohibiting the compelling a person to give "evidence" against himself, or to be a "witness" against himself, and

those providing that no person shall be compelled to "testify" against himself, the latter being held to afford less protection than either of the others.

Many of the cases upholding the right of the court to have the defendant to stand up were upon the theory that the defendant had waived his constitutional right.

In addition to the above authority, we desire to refer to and quote from the case of Boyd *vs.* United States, 116 U. S., 616-641, above referred to.

The court, on page 633, uses this language:

"We have already noticed the intimate relation between the two amendments. They throw great light on each other; for the 'unreasonable search and seizure' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment, and compelling a man in 'criminal cases to be a witness against himself,' which is condemned in the fifth amendment, throw light on the question as to what is a reasonable search and seizure within the meaning of the fourteenth amendment, and we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms."

And again, on bottom of page 634, it is stated:

"* * * And we further are of the opinion that the compulsory production of the private books and papers of the owner of goods is compelling him to be a witness against himself within the meaning of the fifth amendment to the Constitution, and is the equivalent of a search and seizure."

It is clear to us that if the procuring of the defendant's private books and papers without his consent is compelling him to be a witness against himself, then much stronger is the reason for holding that where he is compelled to exhibit himself and walk before the jury for the sole purpose

of identification is within the inhibition of the fifth amendment to the Constitution.

The above case was cited with approval in the later case of Councilman *vs.* Hitchcock, reported in 142 U. S., 547-586; opinion delivered by Mr. Justice Blatchford.

On page 566 we find this language:

"Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case that a witness by disclosing a single fact may complete the testimony against himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself may be unavailing, but all other facts without it would be insufficient."

It seems, too, that this language of the court might well apply to the case at bar. It is very possible, and in fact probable, that without the additional testimony which the petitioner was compelled to furnish the jury might have not been satisfied beyond a reasonable doubt that he was one of the parties guilty of the crime. Being allowed in that manner to measure his height, to ascertain his weight, his general appearance, and by his walking detect his peculiar walk may have furnished the missing link in the testimony or evidence to secure his conviction. Without it they might have concluded that the testimony of the witnesses was simply opinion, but corroborated by it they may have been convinced that he was the guilty party.

As the record may not be as clear as it should be as to whether or not the petitioner undertook to take the witness stand in his own behalf, we state as a matter of fact, without any fear of contradiction, that he made no attempt to take the witness stand in his own behalf; made no attempt whatever to in any way become a witness in his own behalf.

We therefore believe, in view of the authorities herein

cited and with the admitted facts in this case, that the court invaded his constitutional rights when he was compelled to contribute to his conviction, as shown by the record in this case, and for that reason, if no other, the verdict and judgment of the court is void.

ARGUMENT AND AUTHORITY UNDER FOURTEENTH PROPOSITION.

WILL THIS COURT INTERFERE WITH THE ADMINISTRATION OF THE LAWS OF THE TERRITORY, BY ITS COURTS, EVEN WHERE FUNDAMENTAL RIGHTS ARE DISREGARDED?

This proposition raises the question whether the rights guaranteed under the fifth amendment to the Federal Constitution apply only to one branch of the territorial government or to all the branches of the territorial government, for it has been directly held that the sixth amendment is an inhibition upon the legislative branch of a territorial government; now, how about the judicial branch?

We are familiar with the rule, laid down by this court in a number of cases, that the Federal court will not interfere with the State courts in the construction and administration of her laws, except where fundamental rights guaranteed by the Federal Constitution are violated. We think it is well settled that where the courts of the State wholly disregard the fundamental rights guaranteed to a citizen by the State constitution and State laws, which come within the fourteenth amendment to the Federal Constitution, this court would not hesitate to declare such action of the courts void, notwithstanding the legislative branch of the State had violated no provision of the Federal Constitution in enacting such laws; or, in other words, we contend that the judicial departmetn of the Territory, as well as the judicial officers, can no more proceed in such a manner by disregarding the

law of the Territory or State which is in harmony with the fifth amendment to the Federal Constitution, and by that means take away or deprive a citizen of his constitutional rights, than can the legislature by direct enactments take away such rights; that the safeguards contained in the Constitution and the different amendments apply as much to one department of the Territory, as well as the judicial officers, department cannot indirectly proceed in such a manner as would be in conflict with the provisions of the Constitution were it the acts and proceedings of another department which would be in direct conflict with those provisions.

It was held by this court in an opinion delivered by Mr. Justice Day, on November 27, 1905, in the case of Mary Mabel Rogers, appellant, *vs.* Henry H. Peck and Wilson S. Lovell, upon a petition for writ of *habeas corpus:*

"The reluctance with which this court will sanction Federal interference with a State in the administration of its domestic law for the prosecution of crime has been frequently stated in the deliverances of the court upon the subject. It is only where fundamental rights, specially secured by the Federal Constitution, are invaded, that such interference is warranted."

Citing:

Ex Parte Reggel, 114 U. S., 642; 29 L. Ed., 250; 5 Sup. Ct. Rep., 1148.

Re Converse, 137 U. S., 624; 34 L. Ed., 796; 11 Sup. Ct. Rep., 191.

Hodgson *vs.* Vermont, 168 U. S., 262; 42 L. Ed., 461; 18 Sup. Ct. Rep., 80.

Brown *vs.* New Jersey, 175 U. S., 172; 44 L. Ed., 119; 20 Sup. Ct. Rep., 77.

Re Frederick, 149 U. S., 70; 37 L. Ed., 653; 13 Sup. Ct. Rep., 793.

The only contention that can be made by the respondent in this case why the court should not release the prisoner

in this proceeding would be that the petitioner, as has been repeatedly held, is trying to use the writ of *habeas corpus* for a writ of error or appeal. But, fully realizing, as we believe we do, the distinction between the two, and while we admit that the errors complained of herein are such that would have reversed the case had there been any provision by which it could have been reviewed by this court on writ of error, yet, notwithstanding such facts, if the errors were such that the trial court failed to obtain jurisdiction over the petitioner, or lost jurisdiction by errors committed in invading the petitioner's constitutional rights and in transcending plain statutes enacted for the guidance of the court and the protection of the petitioner, then this court will not fail to do its duty and release the petitioner simply because the trial court committed grievous errors, which errors resulted in the unconstitutional and void conviction, especially as the petitioner has exhausted every other remedy given him under the law. The trial court never invades a defendant's constitutional rights without committing error; the trial court never acts in a matter beyond its jurisdiction without committing error. But, as held by this court *In re* Neilson, referred to, it was not mere irregularity in the case at bar, but it was a question of depriving the petitioner of fundamental rights guaranteed him under the Constitution.

We contend in the face of the record, admitting the facts therein to be true, if this judgment can be valid for any purpose, then it is one case where there has been a grievous wrong without a remedy. While we realize the fact that this court cannot consider the question as to whether the defendant was guilty or innocent of the crime charged, yet if it was permitted to do so and take that in consideration in doubtful cases, the petitioner would be able to convince this court beyond any question of doubt of his innocence of the crime charged.

Believing as we do that the petitioner has been deprived of a constitutional trial, as shown by the record in this case,

and that therefore the judgment is absolutely void and of no force and effect, we come with full assurance that when this court has carefully considered the matter he will be released from such unlawful imprisonment.

Respectfully submitted,

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